UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

FRANK R. O'BRIEN JR., O'BRIEN INDUSTRIAL HOLDINGS, LLC, PLAINTIFFS, vs. UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; KATHLEEN SEBELIUS, in her official capacity as the Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF THE TREASURY; TIMOTHY F. GEITHNER, in his official capacity as the Secretary of the United States Department of the Treasury; UNITED STATES DEPARTMENT OF LABOR; and HILDA L. SOLIS, in her official capacity as Secretary of the United States Department of Labor, DEFENDANTS.	)	CASE NO. 4:12-cv-00476-CEJ

PLAINTIFFS' MEMORANDUM IN SUPPORT OF PRELIMINARY INJUNCTION

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INTRODUCTION

Plaintiffs, Frank O'Brien, Jr., and O'Brien Industrial Holdings, LLC (hereinafter "OIH") are asking this Court for preliminary injunctive relief in order to be able to run their business in a manner consistent with the religious values and beliefs that have shaped the company from its start. Absent such relief, by January 1, 2013 at the latest, O'Brien — OIH's Chairman and Managing Member — will face a stark choice: abandon his beliefs in order to stay in business, or abandon his business in order to stay true to his beliefs. That is a choice no government bound by the First Amendment and the Religious Freedom Restoration Act ("RFRA") may lawfully impose upon him.

This is especially true because the choice the government imposes on O'Brien and OIH is a choice the government has decided *not* to impose on thousands of other employers who share O'Brien's view, and tens of thousand more employers (of 100 million employees) who may or may not share O'Brien's views. Such massive under-inclusiveness in rules purporting to further what appears to be a remarkably *non*-compelling "compelling interest" has already led the first court to consider this issue to enjoin the same regulations challenged here. *See Newland v. Sebelius*, 2012 U.S. Dist. LEXIS 104835 (D. Colo. July 27, 2012).

There is immediacy to this matter that will not abide the ordinary time frame of litigation. O'Brien and OIH must begin planning in *the next few weeks* in order to have a new health care policy in place by the plan renewal date of January 1, 2013. Right now, *solely* because of the Defendants' Mandate — a Mandate which, as will be proven herein, is a constitutional and statutory train wreck — the Plaintiffs are faced with a number of unacceptable, *and inescapable*, choices. They could drop health coverage for their 87 employees and, in so doing, incur astronomical fines, hurt their business and — even more — hurt the 87 people who work for

them. The Plaintiffs could go out of business entirely, again hurting both themselves and their employees not to mention the local economy. Or, the Plaintiffs could do something no American government has the right to require of them: abandon their beliefs as part of the cost of doing business.

This Court should act to protect these Plaintiffs by granting the requested Preliminary Injunction and, thus, protect O'Brien and OIH from this unlawful and unprecedented government coercion at least until the matter can be fully adjudicated.

FACTUAL BACKGROUND

O'Brien Industrial Holdings, LLC, has always had an employee benefits program that reflects the religious beliefs of the company's Chairman and Managing Partner, Frank R. O'Brien, Jr. Perhaps unusual for a secular, for-profit business, the first thing that visitors to the company's website see is a statement of OIH's "Mission": "Our mission is to make our labor a pleasing offering to the Lord while enriching our families and society." Decl. of Frank O'Brien ("O'Brien Decl.") (Exh. 1) ¶ 8. This mission statement is followed by a statement of OIH's "Values" that cites the Golden Rule and the Ten Commandments. *Id.* at ¶¶ 9-10. The company's McCree Avenue office displays a statue of the Sacred Heart of Jesus. *Id.* at ¶ 7. Frank O'Brien, Jr., a Catholic, strives to run the company in a manner consistent with the principles of his faith. *Id.*

OIH's website lists the company's "Goals": (1) for OIH's employees to have the ability to own their own home (through wages and an annual profit sharing plan); (2) for OIH's employees to be able to send their kids to college (through the company's college scholarship plan); and (3) for OIH's employees to be able to retire with dignity (through OIH's retirement

plan). *Id.* at ¶ 11. OIH also pledges to "tithe"[1] on the company's earnings through a "St. Nicholas Fund." *Id.* at ¶ 12. This fund encourages employees to "keep their eyes open" for situations where "a little monetary help may make a big difference to someone" so that the company can respond to such needs anonymously. *Id.*

In addition to these things, of course, OIH provides health insurance benefits to its employees. Throughout his tenure, O'Brien has sought to ensure that the health plan — like the rest of OIH's benefits package — is consistent with Catholic teachings. *Id.* at ¶¶ 14-15. Currently, OIH employees have available to them a number of options ranging from a health plan 100% paid for by OIH to options partly paid for by the employee based on variables such as deductibles and specific coverage choices. Consistent with O'Brien's adherence to his church's teachings on issues surrounding the beginnings of human life, OIH's health policies have normally expressly excluded coverage for abortion, contraception, in-vitro fertilization and vasectomies. *Id.* at ¶ 16; Exh. C to O'Brien Decl. And while, in the company's most recent plan coverage for contraceptives was included, this was inadvertent and contrary to OIH's request. *Id*. at ¶ 17. Since the discovery of this mistake, (a mistake apparently connected with Missouri's adoption of its own contraceptive mandate)[2], the company has been seeking to undo it and return OIH's health plan to a policy consistent with the values that, historically, have informed all of its benefits programs. *Id.* ¶¶ 18.

[1] "Tithing" — originally, a Biblical term referring to the setting aside of the first 10% of one's agricultural produce as an offering to God. *See*, *e.g.*, Gen. 28:22; now commonly used to denote the setting aside of 10% of one's income to charity.

[2] The State of Missouri has its own version of a contraceptives mandate. Mo. Rev. Stat. § 376.1199. Unlike the federal Mandate being challenged here, however, the Missouri statute contains a *complete* exemption — not limited to "religious" employers — for any employer for whom "the use of such contraceptives is contrary to the moral, ethical or religious beliefs or tenets of such person or entity." Mo. Rev. Stat. § 376.1199, 4(1).

OIH wishes to continue to provide health coverage for its 87 employees. It wishes to do so in a way that will be consistent with the values and beliefs that have always guided the company. But for the regulations at issue in this case, OIH would be free to obtain a new health plan excluding the services to which it objects, or even set up a self-insurance program. *Id.* at ¶ 18. The company's plan renewal date is January 1, 2013. *Id.* at ¶ 20. In order to have a new plan in place by then, OIH needs 60-90 days to explore whatever options do exist and secure an acceptable new plan. *Id.* The regulations at issue here, however, stand in OIH's way.

THE REGULATIONS BEING CHALLENGED

On March 23, 2010, the Affordable Care Act ("ACA"), Pub. L. No. 111-148, 124 Stat. 119 (2010), became law.[3] ACA requires group health plans to provide no-cost coverage for the preventative care and screening of women in accordance with guidelines created by the Health Resources and Services Administration ("HRSA"). 42 U.S.C. § 300gg-13(a)(4). The HRSA guidelines include, among other things, "the full range of Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity." HRSA, Women's Preventive Services: Required Health Plan Coverage Guidelines *available at* http://www.hrsa.gov/womensguidelines/ (last visited August 21, 2012).

On August 1, 2011, Defendants promulgated an interim final rule ("the Mandate"), requiring all "group health plan[s] and . . . health insurance issuer[s] offering group or individual health insurance coverage" to provide coverage for all FDA-approved contraceptive methods and

[3] In *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012), the Court upheld the so-called "individual mandate" of the ACA under the Constitution's taxing power. In so doing, the Court did *not* rule on the constitutionality of the Mandate challenged herein. In fact, as Justice Ginsburg observed, "A mandate to purchase a particular product would be unconstitutional if, for example, the edict impermissibly abridged the freedom of speech, interfered with the free exercise of religion, or infringed on a liberty interest protected by the Due Process Clause." *Id*. at 2624 (Ginsburg, J., concurring in part, dissenting in part).

sterilization procedures as well as patient education and counseling about those services. 76 Fed. Reg. 46621, 46622 (Aug. 3, 2011); 45 C.F.R. § 147.130. This interim rule, along with the religious employer exemption described below, was adopted as final, "without change," on February 15, 2012. 77 Fed. Reg. 8725, 8729.

Not all employers are required to comply with the Mandate. Grandfathered health plans, i.e., a plan in existence on March 23, 2010, and that has not undergone any of a defined set of changes,[4] are exempt from compliance with the Mandate. *See* 75 Fed. Reg. 41726, 41731 (July 19, 2010).[5] HHS estimates that "98 million individuals will be enrolled in grandfathered group health plans in 2013." *Id.* at 41,732. Even though the Mandate does not apply to grandfathered health plans, many provisions of ACA do. 75 Fed. Reg. 34538, 34542 (June 17, 2010).[6]

Also exempted from the Mandate are "religious employers," as defined at 45 C.F.R. § 147.130(a)(iv)(B). To be eligible for the exemption, such employers must "meet[ ] all of the following criteria: (1) The inculcation of religious values is the purpose of the organization. (2) The organization primarily employs persons who share the religious tenets of the organization. (3) The organization serves primarily persons who share the religious tenets of the organization. (4) The organization is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended." 76 Fed. Reg. 46621, 46626 (Aug. 3, 2011); 77 Fed. Reg. 8725 (Feb. 15, 2012).

In addition, because employers with fewer than 50 full-time employees have no obligation to provide health insurance for their employees under the ACA, they have no

[4] *See* 26 C.F.R. § 54.9815-1251T; 29 C.F.R. § 2590.715-1251; 45 C.F.R. § 147.140.

[5] *See also* 42 U.S.C. § 18011; 76 Fed. Reg. 46621, 46623 ("The requirements to cover recommended preventive services without any cost-sharing do not apply to grandfathered health plans").

[6] A summary of which ACA provisions apply to grandfathered health plans and which do not, can be found here: *Application of the New Health Reform Provisions of Part A of Title XXVII of the PHS Act to Grandfathered Plans*, *available at* http://www.dol.gov/ebsa/pdf/grandfatherregtable.pdf (last visited August 3, 2012).

obligation to comply with the Mandate. 26 U.S.C. § 4980H(c)(2)(A). Finally, under the ACA, individuals are exempt from the requirement to obtain health insurance if they are members of a "recognized religious sect or division" that conscientiously objects to acceptance of public or private insurance funds or are members of a "health care sharing ministry." 26 U.S.C. §§ 5000A(d)(2)(A)(i), (ii), (B)(ii).

Non-exempt employers who fail to provide an employee health insurance plan will be exposed to annual fines of roughly $2,000 per full-time employee. *See* 26 U.S.C. §§ 4980H(a), (c)(1). Additionally, failure to provide certain required coverage may be subject to an assessment of $100 a day per employee. *See* 26 U.S.C. § 4980D(b); *see also* Staman & Shimabukuro, Cong. Research Serv., RL 7-5700, *Enforcement of the Preventative Health Care Services Requirements of the Patient Protection and Affordable Care Act* (2012) (asserting that this tax applies to employers who violate the "preventive care" provision of the ACA).

In summary, the Defendants have written into the challenged regulations categorical exemptions that exclude — literally — upwards of 100 million Americans from "preventative services" coverage. The exemptions apply to both for-profit, secular employers ("grandfathered" plans) as well as non-profit religious employers and, in addition, small employers (fewer than 50 employees) and a number of miscellaneous categories.

Given such massive under-inclusiveness, OIH's entitlement to <u>at least</u> preliminary injunctive relief is clear. For purposes of this motion, Plaintiffs will rely on Counts I (RFRA), II (Free Exercise), III (Establishment Clause) and IV (Free Speech) of the First Amended Complaint. By doing so, Plaintiffs do not abandon any of the other claims contained in the First Amended Complaint.

ARGUMENT

I. PLAINTIFFS SATISFY THE STANDARD FOR INJUNCTIVE RELIEF.

This court may properly exercise its discretion and grant Plaintiffs injunctive relief under Fed. R. Civ. P. 65. In exercising that discretion, this court considers "(1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest." *Dataphase Sys., Inc. v. C.L. Sys., Inc.*, 640 F.2d 109, 113, 114 (8th Cir. 1981) (en banc); *accord Phelps-Roper v. City of St. Charles*, 782 F. Supp. 2d 789, 791 (E.D. Mo. 2011). "At base, the question is whether the balance of equities so favors the movant that justice requires the court to intervene to preserve the status quo until the merits are determined." *Dataphase Sys.*, 640 F.2d at 113. "The equitable nature of the proceeding mandates that the court's approach be flexible enough to encompass the particular circumstances of each case." *Id.* "In balancing the equities no single factor is determinative," *id.*, but the movant must make a threshold showing of being likely to prevail on the merits. *Planned Parenthood of MN v. Rounds*, 530 F.3d 724, 732 (8th Cir. 2008) (en banc).

II. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS.

A. Plaintiffs Are Likely To Succeed On The Merits Of Their RFRA Claim.

Plaintiffs' first claim is that the Mandate is a violation of rights secured to them by the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb, *et seq*. The Act has the following two purposes:

> (1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

> (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

42 U.S.C. § 2000bb(b); *see Harrell v. Donahue*, 638 F.3d 975, 984 (8th Cir. 2011) (explaining that RFRA restored "the pre-*Smith* status quo of requiring the Government to show a compelling interest for any law that substantially burdened the free exercise of religion").

Under RFRA, the "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." 42 U.S.C. § 2000bb-1(a). The only time the federal government may substantially burden a person's exercise of religion is if "it demonstrates that application of the burden ***to the person*** (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b) (emphasis added).

As argued herein, the Mandate imposes a substantial burden on the religious exercise of Plaintiffs, and Defendants cannot demonstrate that the Mandate is in furtherance of a compelling interest and is the least restrictive means of furthering that interest.

1. *The Mandate Substantially Burdens Plaintiffs' Exercise of Religion.*

To trigger the protections afforded by RFRA, Plaintiffs must first show that a federal governmental policy or action substantially burdens their sincerely held religious beliefs. *United States v. Ali*, 682 F.3d 705, 709 (8th Cir. 2012) (citing *Weir v. Nix*, 114 F.3d 817, 820 (8th Cir. 1997)). Under RFRA, "a rule imposes a substantial burden on the free exercise of religion if it prohibits a practice that is both sincerely held by and rooted in [the] religious belief[s] of the party asserting the claim" *Id.* (citation and internal quotation marks omitted).

Several Supreme Court cases are illustrative of what a substantial burden involves in the freedom of religion context. In *Sherbert v. Verner*, 374 U.S. 398 (1963), the Court held that a state's denial of unemployment benefits to a Seventh-Day Adventist employee, whose religious

beliefs prohibited her from working on Sunday, substantially burdened her exercise of religion. The regulation "force[d] her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." *Id.* at 404. In *Thomas v. Review Bd.*, 450 U.S. 707 (1981), the Court held a state's denial of unemployment compensation benefits to a Jehovah's Witness employee, whose religious beliefs prohibited him from participating in the production of armaments, substantially burdened his religious beliefs. "[T]he employee was put to a choice between fidelity to religious belief or cessation of work." *Id.* at 717. In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Court held that a state compulsory school-attendance law substantially burdened the religious exercise of Amish parents who refused to send their children to high school. The Court found the burden "not only severe, but inescapable," requiring the parents "to perform acts undeniably at odds with fundamental tenets of their religious belief." *Id.* at 218.

O'Brien and OIH face the same inescapable burden faced by the religious claimants in these cases. Prior to the Mandate, Plaintiffs were free to fashion a health plan for OIH employees consistent with their religious, specifically Catholic, beliefs and principles, including the choice to exclude services that the Catholic Church deems to be immoral, i.e., abortion, contraception, and sterilization. Now, in the wake of the Mandate, and beginning on January 1, 2013, Plaintiffs must either pay for a health plan that includes drugs and services to which they religiously object or suffer severe penalties. There is no escape; there is no way of avoiding this conflict. Should Plaintiffs exclude contraceptive services in a health plan for OIH employees, OIH will face substantial penalties as set forth in 26 U.S.C. § 4980D, in addition to potential lawsuits by plan participants, plan beneficiaries and the Secretary of Labor. *See* 29 U.S.C. § 1132(a). Should Plaintiffs drop health insurance for OIH employees altogether, OIH will face

substantial penalties as set forth in 26 U.S.C. § 4980H, in addition to losing good will with its employees and losing a competitive edge in the employment marketplace. In short, Plaintiffs cannot create a health plan for OIH employees consistent with their religious beliefs and consistent with longstanding company practice without incurring substantial penalties of some kind.

Defendants cannot deny that the Mandate implicates the religious beliefs and practices of numerous employers. On the contrary, the Defendants themselves have expressly acknowledged the burden on religious beliefs presented by the challenged regulations. Recognizing that paying for, providing, or subsidizing contraceptive services would conflict with "the religious beliefs of certain religious employers," Defendants have granted a wholesale exemption for a class of employers, i.e., churches and their auxiliaries, from complying with the Mandate. 76 Fed. Reg. 46621, 46623 (Aug. 3, 2011); 77 Fed. Reg. 8725 (Feb. 15, 2012). In addition, the government has provided a temporary enforcement safe harbor for any employer, group health plan, or group health insurance issuer that fails to cover some or all recommended contraceptive services and that is sponsored by an organization that meets certain criteria.[7] During the time of this temporary safe harbor, Defendants are considering ways of "accommodating non-exempt, non-profit religious organizations' religious objections to covering contraceptive services [while]

[7] The criteria are as follows:

(1) The organization is organized and operates as a non-profit entity.

(2) From February 10, 2012 onward, contraceptive coverage has not been provided at any point by the group health plan sponsored by the organization, consistent with any applicable state law, because of the religious beliefs of the organization.

(3) The group health plan sponsored by the organization (or another entity on behalf of the plan, such as a health insurance issuer or third-party administrator) provides to plan participants a prescribed notice indicating that the plan will not provide contraceptive coverage for the first plan year beginning on or after August 1, 2012.

(4) The organization self-certifies that it satisfies the three criteria above, and documents its self-certification in accordance with prescribed procedures.

Guidance on the Temporary Enforcement Safe Harbor, at 3 (Feb. 10, 2012), available at http://cciio.cms.gov/resources/files/Files2/02102012/20120210-Preventive-Services-Bulletin.pdf (last visited August 22, 2012)

assuring that participants and beneficiaries covered under such organizations' plans receive contraceptive coverage without cost sharing." 77 Fed. Reg. 16501, 16503. Defendants are even considering whether "for-profit religious employers with [religious] objections should be considered as well." *Id.* at 16504.

Indeed, Defendant Sebelius herself has publicly acknowledged that the Mandate raises religious concerns. In the press release issued on January 20, 2012, announcing the finalization of the Mandate and the temporary safe harbor period for non-profit entities that object to contraceptive services, Defendant Sebelius opined that the temporary reprieve "strikes the appropriate balance between respecting religious freedom and increasing access to important preventative services."[8] Subsequently, in a press release issued on July 31, 2012, Sebelius stated that "[t]he Obama administration will continue to work with all employers to give them the flexibility and resources they need to implement the health care law in a way that protects women's health while making common-sense accommodations for values like religious liberty."[9]

In short, the Defendants cannot make a straight-faced argument in this litigation that the Mandate does *not* impose a substantial burden on the exercise of religious beliefs. Indeed, the Defendants have postponed for a year the application of regulations that purportedly advance a compelling governmental interest solely because of the burden *the Defendants themselves* recognize that these regulations impose on the exercise of religion. Clearly, nothing but a burden of a "substantial" nature could justify such postponement.

[8] Press Release, *A statement by U.S. Department of Health and Human Services Secretary Kathleen Sebelius*, Jan. 20, 2012, http://www.hhs.gov/news/press/2012pres/01/20120120a.html (last visited Aug. 12, 2012).

[9] Press Release, *Health care law gives women control over their care, offers free preventive services to 47 million women*, July 31, 2012, http://www.hhs.gov/news/press/2012pres/07/20120731a.html (last visited Aug. 21, 2012).

2. *Three Anticipated Objections.*

Nor can the Defendants make convincing arguments against Plaintiffs' entitlement to relief in this case based on the status of OIH as a corporation, the status of Frank O'Brien as an individual, or the company's status as a for-profit employer.[10]

That corporations are legal "persons" who enjoy First Amendment rights worthy of protection cannot be gainsaid. *Citizens United v. FEC*, 130 S. Ct. 876, 899 (2010). The cases also make clear that the First Amendment rights enjoyed by corporations include the right to the free exercise of religion. *Braunfeld v. Brown*, 366 U.S. 599 (1961) (adjudicating, *inter alia*, free exercise claims of secular, for-profit businesses); *Stormans, Inc. v. Selecky*, 586 F.3d 1109 (9th Cir. 2009) (adjudicating free exercise claim of for-profit pharmacy corporation); *Primera Iglesia Bautista Hispana v. Broward Cnty.*, 450 F.3d 1295 (11th Cir. 2006) ("corporations possess Fourteenth Amendment rights" including, through incorporation doctrine, "the free exercise of religion."); *EEOC v. Townley Eng'g & Mfg. Co*., 859 F.2d 610 (9th Cir. 1988) (for profit corporation could assert free exercise rights of owners); *Commack Self-Service Kosher Meats, Inc. v. Hooker*, 800 F. Supp. 2d 405 (E.D. N.Y. 2011) (adjudicating corporation's free exercise challenge).

Two state's Supreme Courts have also recognized that for-profit, secular corporations have free exercise rights deserving of protection. *See*, *e.g.*, *Morr-Fitz, Inc. v. Blagojevich*, 231 Ill. 2d 474 (2008) (corporate pharmacy had standing to bring, *inter alia*, federal free exercise claim); and *McClure v. Sports & Health Club, Inc.,* 370 N.W.2d 844, 850 (Minn. 1985) (Minn. 1985) (the "conclusory assertion that a corporation has no constitutional right to free exercise of religion is unsupported by any cited authority").

[10] For a more complete response to these objections, *see* Plaintiffs' Memorandum in Opposition to Dismiss Case, at 7-17. (Doc. 31.)

That Frank O'Brien's individual free exercise rights are burdened by the Mandate is also beyond serious questioning. *See*, *Townley*, *supra.* (recognizing that business owner's free exercise rights are impacted by burden on corporation); also, *Stormans*, *supra*. (corporation had standing to assert free exercise rights of owners); and *Morr-Fitz*, *supra*. (Plaintiffs were both corporations and individual owners).

Finally, there is no merit to any argument that one abandons the right to free exercise upon entering the commercial marketplace. *See Braunfeld*, *supra.* (adjudicating free exercise claims of retail store owners). *United States v. Lee*, 455 U.S. 252 (1982) is not to the contrary. In *Lee*, while ultimately finding that a compelling governmental interest outweighed the free exercise rights of an Amish farmer and carpenter, the Supreme Court acknowledged that — even though he had entered the commercial marketplace — the social security regulations of which he complained were indeed a *burden on his free exercise rights.*

In short, none of these anticipated objections[11] to Plaintiffs' likelihood of success on the merits is valid. Thus, strict scrutiny applies under RFRA.

3. *RFRA Imposes Strict Scrutiny.*

RFRA requires application of the "strict scrutiny test." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430 (2006). This test, which requires "the most rigorous of scrutiny," *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 546 (1993), "is the most demanding test known to constitutional law," *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). The government must demonstrate that the challenged law serves "a compelling governmental interest" *and* is the "least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b).

[11] *See* Defendants' Memorandum in Support of Motion to Dismiss, at 13-20. (Doc. 26.)

As described above, the strict scrutiny test imposed by RFRA must be conducted "through application of the challenged law 'to the person' — the particular claimant whose sincere exercise of religion is being substantially burdened." *O Centro Espirita*, 546 U.S. at 430-31. Indeed, in both *Sherbert* and *Yoder* the Court "looked beyond broadly formulated interests justifying the general applicability of government mandates and scrutinized the asserted harm of granting specific exemptions to particular religious claimants." *Id*. at 431. It is therefore not enough for the government to describe a compelling interest in the abstract or in a categorical fashion; the government must demonstrate that the interest "would be adversely affected by granting an exemption" to the religious claimant. *Id*.; *see also Olsen v. Mukasey*, 541 F.3d 827, 831 (8th Cir. 2008) (under RFRA, "the compelling interest of a challenged law must be evaluated with respect to the particular claimant whose religious exercise is substantially burdened").

In other words, in this case the government must demonstrate that exempting Frank O'Brien and OIH from the Mandate is necessary to advance its compelling interest even while the same government willingly exempts thousands of other employers who employ nearly 100 million employees.

4. *The Defendants Cannot Demonstrate a Compelling Governmental Interest.*

A compelling governmental interest involves "only those interests of the highest order." *Quaring v. Peterson*, 728 F.2d 1121, 1126 (8th Cir. 1984). In fact, in this context, "only the gravest abuses, endangering paramount interests, give occasion for permissible limitation." *Sherbert*, 374 U.S. at 406. The government must demonstrate "some substantial threat to public safety, peace, or order" in not exempting the claimant. *Yoder*, 406 U.S. at 230.

Just last term, the Supreme Court described a compelling state interest as a "high degree of necessity," *Brown v. Entm't Merchs. Ass'n*, 131 S.Ct. 2729, 2741 (2011), noting that "[t]he State must specifically identify an 'actual problem' in need of solving, and the curtailment of free speech must be actually necessary to the solution." *Id.* at 2738 (citations omitted). The "[m]ere speculation of harm does not constitute a compelling state interest." *Consol. Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 543 (1980). As such, the government's invocation of the promotion of health and equality as compelling interests, without more, is insufficient to meet the demands of strict scrutiny. While recognizing "the general interest in promoting public health and safety," the Supreme Court held in *O Centro Espirita* that "invocation of such general interests, standing alone, is not enough." *Id.* at 438.

In its Motion to Dismiss Plaintiffs' First Amended Complaint, the government proffered two compelling governmental interests: (1) increased access to FDA-approved contraceptive services serves the health and well-being of women, and (2) the equalization of health care between men and women. (Doc. 26, at 20-22.) What radically undermines the government's claims of compelling interests is the massive number of employees, millions in fact, whose health and equality are completely unaffected by the Mandate and therefore not served by the government's alleged interests. *See Newland*, 2012 U.S. Dist. LEXIS 104835 at *23. For example, the government cannot explain how its alleged interests can be compelling when employers with fewer than 50 employees[12] have no obligation to provide health insurance for their employees and thus no obligation to comply with the Mandate.[13] With respect to Plaintiffs, it cannot sufficiently explain how there is a compelling interest in coercing OIH and O'Brien,

[12] According to the United States census, more than 20 million individuals are employed by firms with fewer than 20 employees. "Statistics about Business Size (including Small Business) from the U.S. Census Bureau," *available at* http://www.census.gov/econ/smallbus.html (last visited August 3, 2012).

[13] Under 26 U.S.C. § 4980H(c)(2), employers are not subject to penalties for not providing health insurance coverage if they have fewer than 50 full-time employees.

with their 87 employees, into violating their religious principles when businesses with fewer than 50 employees can avoid the Mandate entirely by not providing any insurance at all.

Defendants also cannot explain how these interests can be of the highest order when the Mandate does not apply to plans grandfathered under the ACA. The government itself has estimated that "98 million individuals will be enrolled in grandfathered group health plans in 2013." 75 Fed. Reg. 41,726, 41,732 (July 19, 2010). When this figure is added to the number of employees of businesses with fewer than 50 employees, it is fair to say that well over 100 million employees are left untouched by the government's claim of compelling interests. "It is established in our strict scrutiny jurisprudence that a law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi*, 508 U.S. at 547 (citations and internal quotation marks omitted). Because there is little that is uniform about the Mandate, as demonstrated by the massive number of employees that are untouched by it, we do not have an instance here of "a need for uniformity [that] precludes the recognition of exceptions to generally applicable laws under RFRA." *O Centro Espirita*, 546 U.S. at 436.

It is the existence of these enormous loopholes in the Mandate that, just last month, led Judge Kane in *Newland v. Sebelius*, to issue a preliminary injunction: the "massive" number of employees untouched by the Mandate "completely undermines any compelling interest in applying the preventive care coverage mandate to Plaintiffs." *Newland*, 2012 U.S. Dist. LEXIS 104835 at *23.

Moreover, the fact that contraceptive services are widely available throughout the country further undercuts the government's assertions that its interests are compelling. The government describes its asserted interests as though a vast majority of citizens forego contraception or that

no one has ready access to it. But the facts simply do not support the government's cry of alarm as attested to by the statements of the Defendants themselves as well as sources upon which the defendants rely.[14] In fact, even if the government could show that the Mandate has the potential to increase the availability of contraceptives to *some* degree, "the government does not have a compelling interest in each marginal percentage point by which its goals are advanced." *Brown*, 131 S.Ct. at 2741, n.9.

In sum, the government cannot demonstrate a "paramount" interest or "interest of the highest order" in requiring OIH to comply with a mandate for its 87 employees that does not apply to the employers of over 100 million employees nationwide. It cannot demonstrate a "substantial threat to public safety, peace, or order" should OIH be exempt from the Mandate.

5. The Mandate is not the Least Restrictive Means.

The existence of a compelling interest in the abstract does not give the government *carte blanche* to promote that interest through any regulation of its choosing particularly where, as here, the government's attempt at regulation runs up against what the government itself recognizes is the exercise of a fundamental right. If the government "has open to it a less drastic way of satisfying its legitimate interests, it may not choose a [regulatory] scheme that broadly stifles the exercise of fundamental personal liberties." *Anderson v. Celebrezze*, 460 U.S. 780, 806 (1983).

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[14] Guttmacher Institute, *Fact Sheet: Contraceptive Use in the United States*, July 2012, http://www.guttmacher.org/pubs/fb_contr_use.html (last visited Aug. 3, 2012) ("Nine in 10 employer-based insurance plans cover a full range of prescription contraceptives").

Also, Press Release, *A statement by U.S. Department of Health and Human Services Secretary Kathleen Sebelius*, Jan. 20, 2012, http://www.hhs.gov/news/press/2012pres/01/20120120a.html (last visited Aug. 3, 2012), noting that "contraceptive services are available at sites such as community health centers, public clinics, and hospitals with income-based support."

And also, Guttmacher Institute, *Fact Sheet: Contraceptive Use in the United States*, July 2012, http://www.guttmacher.org/pubs/fb_contr_use.html (last visited Aug. 3, 2012) ("Among women who are at risk of unintended pregnancy, 89% are currently using contraceptives.").

Assuming *arguendo* that the interests proffered by the government are compelling, the Mandate is not the least restrictive means of furthering those interests. If the government wishes to further the interests of health and equality by means of free access to contraceptive services, it could do so in a myriad of ways without coercing OIH and O'Brien, in violation of their religious exercise, into doing so.

First and foremost, the government could provide these services to citizens itself. In fact, the government already provides the needy with free access to contraceptives through Medicaid. (*See* Doc. 26 at 19.) It could similarly do so for all citizens, without a showing of need.

Second, in an effort to meet its compelling governmental interests, the government could reimburse citizens who pay to use contraceptives, allowing citizens to submit receipts to the government for payment.

Third, the government could offer tax deductions or credits for the purchase of contraceptive services. The government already offers deductions and credits for such things as educational expenses and child and dependent care expenses. It could similarly do so here.

Fourth, the government could impose a mandate on pharmaceutical companies that manufacture contraceptives to provide such products through pharmacies, doctor's offices, and health clinics free of charge.

Each of these options would further the government's proffered compelling interests in a direct way that would not impose a substantial burden on persons such as OIH or O'Brien. *See Newland*, 2012 U.S. Dist. LEXIS 104835 at *23-27 (rejecting government's claim that the Mandate furthers a compelling governmental interest through the least restrictive means.) Of the various and sundry ways the government could achieve its interests, it has chosen a path with

clear and undeniable adverse consequences to employers with religious objections to contraceptive services, such as Plaintiffs.

While the government may contend that any or all of these options would prove difficult to establish or operate, "least restrictive means" does not mean the most convenient way for the government. Even if *the government* claims these or other options would not be as effective or efficient as the Mandate, "*a court* should not assume a plausible, less restrictive alternative would be ineffective." *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 824 (2000). In fact, if a less restrictive alternative would serve the government's purpose, "the legislature must use that alternative." *Id.* at 813. The asserted interests of health and equality "cannot be invoked as a talismanic incantation to support any [law]." *United States v. Robel,* 389 U.S. 258, 263 (1967).

It is clear that Plaintiffs have a strong likelihood of success on their RFRA claim.

B. Plaintiffs Are Likely to Succeed on the Merits of their Free Exercise Claim.

In addition to violating Plaintiffs' rights under RFRA, the Mandate operates to deny Plaintiffs their right to the free exercise of religion even under the analytical framework announced in *Employment Div. v. Smith*, 494 U.S. 872 (1990). "A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny." *Lukumi*, 508 U.S. at 546. "Neutrality and general applicability are interrelated" and "failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Id.* at 531-32. Here, because the Mandate is not neutral or of general application, strict scrutiny applies — a demanding standard the government cannot survive.

1. *The Mandate is Not Neutral.*

It goes without saying that the government may not discriminate among classes of religious believers based on their status as institutions, organizations, or preferred denominations. *See, e.g., Lukumi*, 508 U.S. at 533; *McDaniel v. Paty*, 435 U.S. 618 (1978).

Using its "discretion," the government has exempted from the Mandate non-profit entities that have as their purpose the "inculcation of religious values," "primarily employs persons who share its religious tenets" and "primarily serves persons who share its religious tenets." 76 Fed. Reg. 46621, 46623 (Aug. 3, 2011); 77 Fed. Reg. 8725 (Feb. 15, 2012). Thus, under the Mandate, some religious organizations and institutions, like churches and their "integrated auxiliaries," *id.*, enjoy a wholesale exemption from compliance, but other entities with religious principles and beliefs, like OIH, for example, are subject to them. Such a discriminatory system gives obvious preference to the religious beliefs and practices of certain religious institutions over those who do not satisfy the government's definition of "religious employer"; it gives a *religious* preference; a preference for entities that practice their religion according to standards set out by the government, over those who do not. The Mandate thus fails the test of religious neutrality by granting a blanket exemption to religious institutions while leaving other religious employers unprotected — the very kind of "religious gerrymander" which demonstrates a lack of neutrality. *Lukumi*, 508 U.S. at 534 ("The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders") (citations omitted).

In *Frazee v. Employment Security Dept.,* 489 U.S. 829 (1989), the Court definitively dismissed the idea (implicit in the Mandate and its narrow religious exemption) that institutionalized or organized religion is somehow entitled to greater deference than individual beliefs: "we reject the notion that to claim the protection of the Free Exercise Clause, one must

be responding to the commands of a particular religious organization. Here, Frazee's refusal [to work on the Sabbath] was based on a sincerely held religious belief. Under our cases, he was entitled to invoke First Amendment protection." *Id.* at 834.

Finally, there can be little doubt that the Mandate targets religiously-motivated conduct. "[T]he effect of a law in its real operation is strong evidence of its object." *Lukumi*, 508 U.S. at 535. *Prior* to the Mandate, religious employers like Plaintiffs were permitted to fashion their health insurance plans according to their religious, moral, and conscientious beliefs. *Now*, in the wake of the Mandate, religious employers like Plaintiffs must either abandon these religious, moral, and conscientious beliefs or pay substantial penalties. Given the widespread use and availability of contraception, not to mention the fact that 90% of employers already include contraceptive services in employee health plans, there is strong evidence to suggest that a principal object of the Mandate is to coerce those "hold out" employers, like Plaintiffs, who object to providing contraceptive services on religious grounds.

2. *The Mandate is Not Generally Applicable.*

Because the Mandate does not apply to grandfathered health plans or religious employers as defined at 45 C.F.R. § 147.130(a)(iv)(B), and because employers with fewer than 50 employees can avoid the Mandate entirely by dispensing with health insurance altogether, the Mandate is not generally applicable.[15] Unlike in *Smith*, which involved "across-the-board criminal prohibition on a particular form of conduct," 494 U.S. at 1603, the Mandate is not an "across-the-board requirement" that all employers nationwide include contraceptive services in health plans for employees. The Mandate substantially burdens the religiously motivated

[15] Individuals who are members of a "recognized religious sect or division" that conscientiously objects to acceptance of public or private insurance funds or are members of a "health care sharing ministry" are also exempt from the ACA and therefore the Mandate. *See* 26 U.S.C. §§ 5000A(d)(2)(a)(i), (ii), (b)(ii).

conduct of OIH and O'Brien while, at the same time, exempting a sizable population that either has nothing to do with religion or that does not meet the government's definition of a "religious employer." Such a scheme can hardly be described as generally applicable.

There can be no merit to an argument that, because these exemptions do not create a subjective, case-by-case inquiry into the reasons for an employer's objection to covering contraceptive services, strict scrutiny cannot apply. *Smith* and *Lukumi* do not support this view. As now Justice Alito wrote for the Third Circuit in *Fraternal Order of Police v. City of Newark*, 170 F.3d 359 (3d Cir. 1999), holding that a police department violated the free exercise clause when it refused religious exemptions from prohibition against officers wearing beards while allowing medical exemption from same prohibition:

> While the Supreme Court did speak in terms of "individualized exemptions" in *Smith* and *Lukumi*, it is clear from those decisions that the Court's concern was the prospect of the government's deciding that secular motivations are more important than religious motivations. *If anything, this concern is only further implicated when the government does not merely create a mechanism for individualized exemptions, but instead, actually creates a categorical exemption for individuals with a secular objection but not for individuals with a religious objection.*

Id. at 365 (emphasis supplied).

In other words, *categorical* secular exemptions make a law *even less* generally applicable than *individualized* secular exemptions. And, in this case, there is something even more egregious than a categorical preference for secular exemptions over religious ones: it is a categorical exemption for one class of religious objectors over another class of religious objectors. In addition, recognizing a categorical exemption for employers with grandfathered health plans but not employers with a religious objection to contraceptive services like Plaintiffs, belies any assertion that the Mandate is generally applicable. By exempting some religious objectors, but not others, and exempting some employers for secular reasons but not religious

ones, the regulations at issues are "sufficiently suggestive of discriminatory intent so as to trigger heightened scrutiny under *Smith* and *Lukumi*." *Id.*; *see also Lukumi,* 508 U.S. at 542 (1992) ("All laws are selective to some extent, but categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice. The Free Exercise Clause protect[s] religious observers against unequal treatment") (citation and internal marks omitted).

Where the government "has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardships' without compelling reason." *Lukumi*, 508 U.S. at 568 (quotations and internal citations omitted). Similarly, because the government under ACA and the Mandate has in place a system of *categorical* exemptions, it may not refuse to exempt entities that demonstrate religious hardship, like OIH, "without compelling reason." As previously explained, the government cannot satisfy the demanding standard of strict scrutiny.

Thus, O'Brien and OIH are likely to succeed on the merits of their Free Exercise claim.

C. Plaintiffs Are Likely to Succeed on the Merits of their Establishment Clause Claim.

In addition to violating RFRA and the Free Exercise Clause, the Mandate violates the Establishment Clause for two reasons. First, the Mandate is subject to strict scrutiny under *Larson v. Valente*, 456 U.S. 228 (1982) — which it cannot survive as explained previously — because it differentiates between various religious organizations based upon whether they adhere to a particular theological viewpoint. Second, the Mandate fosters excessive entanglement with religion by authorizing government officials to decide whether an objecting organization's mission, values, and activities are truly religious or secular in nature and whether an organization and the individuals that it employs and serves share the same religious tenets.

In *Larson*, the Supreme Court applied strict scrutiny to a statute that imposed requirements upon religious organizations that solicited over half of their funds from non-

members. *Id.* at 246-47. Although the government argued that it was "a facially neutral statute, the provisions of which happen to have a 'disparate impact' upon different religious organizations," *id.* at 246 n.23, the Court concluded that the statute "makes explicit and deliberate distinctions between different religious organizations" and had the effect of distinguishing between established religious organizations and new ones. *Id.* This differential treatment gave rise to the application of strict scrutiny. *Id.* at 246-47.

The Mandate is similar in key respects to the law at issue in *Larson*. Both provisions "make[] explicit and deliberate distinctions between different religious organizations." *See id.* at 246 n.23. Both provisions disproportionally burden certain religious denominations and organizations while benefiting others.[16] The government cannot expressly single out one type of religious organization for disfavored treatment when it enacts statutes or rules, as it did here and in *Larson*, and then claim that it has not done so in litigation.

In addition, while the differential treatment of religious organizations in *Larson* reflected the theological view that soliciting funds from members of one's own faith is preferable to soliciting funds from non-members, the differential treatment of religious organizations in this instance reflects the theological view that religious organizations that emphasize religious education of members of their own faith are more *truly* religious, and deserving of an exemption, than faith-based organizations that pursue any other religious mission. This government-imposed orthodoxy runs counter to the longstanding principle that "no official, high or petty, can prescribe what shall be orthodox in . . . religion, or other matters of opinion." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

[16] For example, various religious employers who employ and serve only members of their own faith are exempt from the mandate, which will benefit employers of some faiths more (e.g., Old Order Amish and Orthodox Jewish groups), while employers who employ and serve members of the broader community are subject to the mandate.

Contrary to the theological position reflected in the Mandate, many organizations are not engaged in proselytizing when they deliver social, medical, and other services, yet the very provision of these services is itself a fulfillment of their religious mission. *See Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 106 (Cal. 2004) (Brown, J., dissenting) ("[A] crabbed and constricted view of religion . . . would define the ministry of Jesus Christ as a secular activity"). In addition, some business leaders, such as Frank O'Brien, sincerely view the operation of all aspects of their business as a divinely-inspired calling and a way to share their faith through their example. *See generally Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 345 n.6 (1987) (Brennan, J., concurring) ("It is . . . conceivable that some for-profit activities could have a religious character"). The theological line drawn by the Mandate between religious organizations that primarily share their faith through *words* and "less" religious organizations that primarily share their faith through *actions* is no less suspect than the line drawn in *Larson*.

The second reason the Mandate violates the Establishment Clause arises from the Mandate's partial religious employer exemption, an exemption that requires a government review of an organization's purpose(s), values, and activities so that the government may decide whether the organization has the inculcation of religious values as its purpose and whether the individuals employed and served by the organization share its religious tenets. This review runs afoul of two key principles set forth in cases that examined whether the government had become excessively entangled with religion. First, the government violates the Establishment Clause (and other First Amendment provisions) when it seeks to decide which of an organization's activities are truly religious and which are secular. Second, courts have often examined whether

a law fosters more or less entanglement than an alternative approach would and have favored the less problematic option.

More than seven decades ago, the Supreme Court held that a law empowering a government official to determine whether a cause for which donations were solicited was truly a "religious" cause was unconstitutional. *Cantwell v. Connecticut*, 310 U.S. 296, 305-07 (1940). The Court reiterated this point in *Lemon v. Kurtzman*, 403 U.S. 602 (1973), when it held that a law providing a salary supplement to private school teachers that taught only secular courses created an excessive entanglement with religion. *Id.* at 617-20. The Court explained:

> [T]he program requires the government to examine the school's records in order to determine how much of the total expenditures is attributable to secular education and how much to religious activity. This kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids.

Id. at 619-20; *see Hernandez v. Comm'r of Internal Revenue*, 490 U.S. 680, 694 (1989).

Both because it is clear that the Mandate deems some religious believers to be more religious than others and, thus, worthy of exemption; and because the Mandate requires those seeking exemption to pass some sort of bureaucratic "religiousness" test; all of which violates decades-old Supreme Court jurisprudence in this area, it is likely that Plaintiffs will succeed on the merits of their Establishment Clause claim.

D. Plaintiffs Are Likely to Succeed on the Merits of their Free Speech Claim.

In addition to paying for coverage of services they find religiously objectionable, the Mandate requires O'Brien and OIH to pay for "patient education and counseling" about those services. *See* 76 Fed. Reg. 46621, 46622 (Aug. 3, 2011); 45 C.F.R. § 147.130.

This is an example of the kind of coerced speech that the Free Speech Clause of the First Amendment forbids. The Supreme Court has long held that the "right to speak and the right to

refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (quoting *West Virginia State Bd. of Educ. V. Barnette,* 319 U.S. 624, 637 (1943)). Put more succinctly, the First Amendment protects the right to "decide what not to say." *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston,* 515 U.S. 557, 573 (1995). Thus, "[l]aws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny," as those "that suppress, disadvantage, or impose differential burdens upon speech because of its content." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 624, 642 (1994). The "First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster, in the way [the government] commands, an idea they find morally objectionable." *Wooley*, 430 U.S. at 715.

Requiring O'Brien and OIH to pay for "education and counseling" in favor of services they find morally objectionable runs afoul of core Free Speech rights. As such, Plaintiffs are likely to succeed on the merits of their Free Speech claim.

III. PLAINTIFFS WILL SUFFER IRREPARABLE HARM ABSENT AN INJUNCTION.

An injunction should be issued because Plaintiffs' First Amendment and RFRA rights are being violated by the Mandate as discussed *supra*. The deprivation of First Amendment freedoms even for a short period of time constitutes irreparable harm, *Elrod v. Burns*, 427 U.S. 347, 373–74 (1976), and "a plaintiff satisfies the irreparable harm analysis by alleging a violation of RFRA." *Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001).

O'Brien and OIH must act as soon as possible to have a new health plan in place by the plan renewal date of January 1, 2013. The fact that the company cannot *today* purchase new

coverage or amend its current coverage to exclude the objectionable services because of the Mandate is proof that the Plaintiffs are — at this moment — suffering irreparable harm.

IV. AN INJUNCTION WOULD CAUSE NO HARM TO DEFENDANTS.

Any argument that the Defendants would be harmed by the issuance of a Preliminary Injunction in this case would be frivolous. The Defendants themselves have already stayed their hand for thousands upon thousands of employers of 100 million employees! An order requiring them to refrain from applying the Mandate to O'Brien and OIH while this case is pending could not conceivably be said to cause harm to any of the Defendants' interests. Moreover, there *is* no legitimate governmental interest to be furthered by Defendants' infringement of Plaintiffs' constitutional and statutory rights. *See Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008) ("The balance of equities, too, generally favors the constitutionally-protected freedom of expression."); *accord Phelps-Roper v. City of St. Charles*, 782 F. Supp. 2d 789, 794 (E.D. Mo. 2011) ("The injunction will not cause substantial harm to others and the public is served by the preservation of constitutional rights. *Nixon*, 545 F.3d at 694. Thus, the balance of harms requires the issuance of the requested preliminary injunction.").

V. THE PUBLIC INTEREST FAVORS A PRELIMINARY INJUNCTION.

As discussed *supra*, the Mandate violates Plaintiffs' constitutional and statutory rights. The public has no interest in having Defendants violate those rights and, as such, an injunction will not negatively impact the interests of the public. *Nixon*, 545 F.3d at 690 ("it is always in the public interest to protect constitutional rights.").

VI. THIS COURT SHOULD NOT IMPOSE A BOND ON PLAINTIFFS.

According to Fed. R. Civ. P. 65(c), this court "may issue a preliminary injunction . . . only if the movant gives security in an amount that the court considers proper to pay the costs

and damages sustained by any party found to have been wrongfully enjoined or restrained." "The amount of the bond rests within the sound discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of that discretion." *Stockslager v Carroll Elec. Coop. Corp.*, 528 F.2d 949, 951 (8th Cir. 1976). In this case, a bond requirement would further harm Plaintiffs' constitutional and statutory rights by causing them to have to pay to assert and defend their rights. Moreover, enjoining the enforcement of the Mandate as to Plaintiffs will not impose any monetary requirements on Defendants. Consequently, Plaintiffs request that no bond be imposed should an injunction issue. *See City of St. Charles*, 782 F. Supp. 2d at 794 (not requiring a bond).

CONCLUSION

Because the Plaintiffs have shown that they are currently suffering irreparable harm, that they are likely to succeed on the merits of their claims, that the balance of harms favors the Plaintiffs, and that no harm to the public interest would result from the issuance of the relief requested, this Court should grant Plaintiffs' motion for a Preliminary Injunction against Defendants' requirement that Plaintiffs include in their employee health plan coverage for contraceptives, sterilization and patient education and counseling for same.

A proposed form of Order is attached.

Respectfully submitted on this 23rd day of August, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on August 23, 2012, the foregoing was filed electronically with the Clerk of Court to be served by operation of the Court's electronic filing system upon the following:

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